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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-647

KAREN MARCHIORO, ET AL.,
Appellants,

v.

NEALE V. CHANEY AND THE WASHINGTON STATE DEMOCRATIC COMMITTEE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLANTS' REPLY TO MOTION TO AFFIRM JUDGMENT

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FACTS

Appellees concede the facts and holdings below that squarely present the question whether appellants' First Amendment rights are substantially burdened by RCW 29.42.020.

First, appellees recognize that the State Democratic Convention is the supreme State Democratic Party authority and that the charter adopted by the 1976 Convention is binding on the State Committee unless prohibited by valid state law. *See* Motion to Affirm at 6; 90 Wn.2d at 313 (Juris. State., App. A at 16).

Second, appellees admit that this charter mandates a State Committee made up of two delegates per county plus one delegate from each legislative district. *See* Motion to Affirm at 5.

Third, appellees recognize that appellants are party members and officers and that several appellants are delegates elected from legislative districts to the State Committee. *See* Motion to Affirm at 2.

Fourth, appellees admit that RCW 29.42.020 compels them to bar legislative district representatives, including appellants, from the State Committee and from participating in its political activities. *See* Motion to Affirm at 5.[1]

Fifth, appellees acknowledge the State Committee's integral role in the Democratic Party's state political apparatus. As recognized by appellees, the State Committee makes "'*intraparty rules governing the statewide operations of the party as a political organization* between conventions'"[2] and raises and distributes money to party candidates. *See* Motion to Affirm at 4.

On the basis of these facts, the court below held that the burdens that RCW 29.42.020 places on appellants' First Amendment rights are not sufficient even to require inquiry into whether a state interest justifies the restrictions.

1. Appellees state that "resistance to the seating of the legislative district representatives" is mandated by the party charter. Motion to Affirm at 5 n.2. While the nature of appellees' argument is not clear, it is sufficient for the purposes involved here to note that the court below clearly held that the only bar to the seating of the legislative district representatives is RCW 29.42.020 and that, if that statute is unconstitutional, the legislative district representatives would be seated. *See* 90 Wn.2d at 314 (Juris. State., App. A at 17).

2. Motion to Affirm at 4, *quoting King County Republican Central Committee v. Republican State Committee*, 79 Wn.2d 202, 212, 484 P.2d 387 (1971) (emphasis added).

THE QUESTION PRESENTED IS SUBSTANTIAL

Appellees recognize that RCW 29.42.020 bars appellants and all Democratic Party members from implementing their convention's decision regarding the composition of their party's State Committee and prohibits several appellants from serving in their party-authorized roles as participants in the decisions of the State Committee. *See* Motion to Affirm at 7. Appellees also recognize that RCW 29.42.-020 frustrates the party's attempts to administer itself on the basis of its charter's command of equal rights and proportional representation for its members. *See id.* Nonetheless, appellees assert:

> None of the alleged burdens claimed by the plaintiffs describes a substantial burden of a right protected by the freedom of association guaranteed by the First Amendment.

Id. at 7-8.

Appellees cite no authority in support of this astonishing assertion but instead rely entirely on attempts to distinguish the precedent cited in appellants' Jurisdictional Statement. Appellees' purported distinctions are blatantly contrary to established First Amendment doctrine.

For example, appellees claim that *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449 (1958), and *Bates v. Little Rock*, 361 U.S. 516 (1960), which hold that participation in private associations is a protected right, are distinguishable because:

> These cases thus dealt with state interference with the freedom of individuals to form groups to exercise their First Amendment freedom of speech and petition, not state regulation of the internal structure of the group which resulted.

Motion to Affirm at 9.

Appellees apparently believe that although the First Amendment protects the right of an association and its members to have a general membership constituted without state interference, it does not protect the right of an association and its members to have the association's internal bodies constituted without state interference. This attempted distinction between the right to join a private association and the right to structure its internal bodies has no basis in the First Amendment and is squarely contrary to the holding in *Cousins v. Wigoda*, 419 U.S. 447 (1975), that state interference with the composition of a national party nominating convention is subject to First Amendment scrutiny.[3] *Accord, Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 6 (1964) (association has protected right to create internal body to recommend legal counsel). Freedom of association is more than just the freedom to join an association.

Appellees assert that *Kusper v. Pontikes*, 414 U.S. 51 (1973), which holds protected the right to participate in party affairs, is distinguishable because:

> RCW 29.42.020 does not exclude plaintiffs in the present case from participating to the same extent as any other citizen in the affairs of the Democratic Party, nor are plaintiffs excluded from any role in selecting the party's candidates for public office.

Motion to Affirm at 10. The claim that excluding appellants from their duly-elected positions on the party's governing

3. Although *Cousins* involved state regulation of national (as opposed to state) party bodies, that fact is relevant only to the question of whether a compelling state interest justifies such regulation. The regulation, itself, whether attempted by a city, state, or the federal government, creates the same substantial burden on freedom of association. *See* Juris. State. at 14 n.15. Further, *Cousins* cannot be distinguished on the grounds that the principal question involved a nominating convention. The Court explicitly held that the analysis is the same for a post-convention caucus. *See* 419 U.S. at 481 n.3; Juris. State. at 10-11 n.13.

body does not restrict their participation in party affairs lacks any credibility. A more important form of participation in Democratic Party affairs than a seat on its State Committee is difficult to imagine.

Appellants attempt to distinguish *Cousins v. Wigoda*, 419 U.S. 477 (1975), on the grounds that it:

> dealt with the freedom of association as part of freedom of speech, the freedom to advance ideas, create controversy, and choose candidates to attempt to implement those ideas through the government. . . . The State Committee serves none of these functions. . . .

Motion to Affirm at 12. If the freedom to advance ideas and create controversy does not include a right to serve on or choose the representatives on the statewide governing body of a political party—the body that governs the party between conventions and distributes funds to candidates—it is difficult to see what those freedoms involve.

Appellees do not even attempt to distinguish *Fahey v. Darigan*, 405 F. Supp. 1386 (D.R.I. 1975), because it is so directly on point. Rather, they claim it is wrong because it fails to distinguish between the activities of party conventions and party primaries (which appellees recognize are protected) and "internal administrative organizations of political parties" (which appellees imply are not protected). The concept that freedom of association extends only to party debates and candidate selection and does not include a right to organize political parties in the way that will make them the most effective is squarely contrary to established precedent. *See Cousins v. Wigoda*, 419 U.S. 477 (1977); *Ripon Society v. National Republican Party*, 525 F.2d 567, 585 (CADC 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976); *cf. Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 6 (1964)

(association has protected right to create internal body to recommend legal counsel).

Appellees also claim that *Fahey* failed to distinguish between a state's interest in regulating national party activities and a state's interest in regulating state party activities. This contention questions only *Fahey's* ultimate conclusion that Rhode Island had no compelling state interest justifying the regulation of the composition of Democratic Party committees. It does not address the court's prior finding that such regulation imposes a substantial burden on freedom of association which triggers First Amendment scrutiny and the requirement that state interests be examined. *See* 405 F. Supp. at 1398. In the present case, the court below held that RCW 29.42.020 is not subject to *any* First Amendment inquiry into state interest.

Sensing the futility of defending RCW 29.42.020 on the preposterous ground that it does not substantially burden appellants' freedom of association, appellees quote from *Storer v. Brown*, 415 U.S. 724 (1974), *Kusper v. Pontikes, supra*, and *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976), for the proposition that a state can have a valid interest in election codes that protect the integrity of the electoral process. However, as established in separate litigation, when the Democratic State Committee nominates candidates or performs other ballot-related functions, the "two votes per county, no more and no less" requirement of RCW 29.42.020 does not apply. *See* Juris State. at 4 n.4; *cf.* Motion to Affirm at 3.

In defense of RCW 29.42.020, appellees argue only that the state's interest in the stability and integrity of its electoral process gives it an interest in ensuring that a state committee exist: "[The statute] insures that each major

political party, having established itself as such, shall have an administrative body between state party conventions . . . [thus] insuring the stability and integrity of the electoral process." Motion to Affirm at 16.

Even assuming that appellees are correct in asserting that Washington has a compelling interest in the existence of a Democratic State Committee, appellees have made no argument and can make no argument that the requirement challenged here, that there be two and only two persons per county on the state committee, is the least restrictive means of satisfying such an interest.[4] A requirement that there be a state committee, or that there be a state committee with *at least* two persons from each county, would serve the interest of stability and whatever state interest exists in ensuring that all areas of the state are represented. The present requirement, effectively mandating that 23 percent of the population control 77 percent of the state committee, is not necessary to meet these interests.

Appellees' final defense of RCW 29.42.020 is a claim that 30 other states regulate the composition of party state committees. Motion to Affirm at 16 n.6. Examination of the statutes cited by appellees reveals, however, that in six of those states the party itself determines the composition of the state committee.[5] Several of these states use precisely "the minimum but no maximum" formula that appellants

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4. A statute that burdens First Amendment rights must not only be justified by a compelling state interest, it must also use the least restrictive means to satisfy that interest. *See, e.g., Kuspar v. Pontikes*, 414 U.S. 51, 58-61 (1973); *American Party of Texas v. White*, 415 U.S. 767, 780-81 (1974).

5. Arkansas (Ark. Stat., 1947, § 3.102); Indiana (Indiana Code 3-1-2-1); Maryland (Michie's Code, Article 33, § 11-2(a)); Nevada (Nev. Rev. Stat., § 293.153); New Hampshire (N.H. Rev. Stat. Annot., ch. 56, § 63); New York (McKinney's Con. Laws of New York Anno., § 2-102(1)).

assert would be a less restrictive means here.[6]

Of the remaining states cited by appellees, twelve mandate a formula based on one-person, one-vote principles.[7] Whatever the ultimate validity of such laws, a state's interest in ensuring equal representation for all persons on party state committees is clearly different than a state's interest, if any, in mandating a state committee composition that results (as here) in gross underrepresentation of persons within the state.

Although appellees' citation of statutes in other jurisdictions is thus misleading, appellants agree that the issue raised here is not confined to Washington law. Twelve states, in addition to Washington, mandate a state committee composition that is not within the control of the party or tied to one-person, one-vote principles.[8] Indeed, the existence of such restrictions in other states is an additional reason for review. Where, as in Washington, the

6. For example, Indiana provides for a state committee made up of two persons per congressional district plus whatever additional members the state committee sees fit to provide, Indiana Code 3-1-2-1. Similarly, Nevada provides for a state committee to be made up as determined by the state party convention with a minimum of one representative from each county, Nev. Rev. Stat., § 293.153, and New Hampshire provides for a state committee made up of all county committeemen, with the number of county committeemen determined by the state convention, N.H. Rev. Stat. Annot. ch. 56, § 63.

7. Arizona (Arizona Rev. Stat., § 16-233); Illinois (Ill. Rev. Stat., § 46-7-8(a)); Iowa (Iowa Code, § 43.111); Louisiana (La. Rev. Stat., § 18:285(1)(a)); Massachusetts (Mass. Gen. Laws, ch. 52, § 1); Michigan (Mich. Stat. Annot., § 6.1597); Mississippi (Miss. Code, § 23-1-3(a)); Missouri (Mo. Rev. Stat., § 115.623); North Dakota (N.D. Century Code Anno., § 16-17-11); Ohio (Baldwin & Page's Ohio Rev. Code, § 3517.03); Tennessee (Official Tenn. Code Annot., § 2-1304); West Virginia (Michie's Code, ch. 3, Art. 1, § 9).

8. California (Election Code, §§ 8660-8675); Colorado (Col. Rev. Stat., § 1-14-108(2)); Idaho (Idaho Code, § 34-504); Kansas (Kan. Stat. Anno., § 25-3804; Montana (Montana Rev. Code, § 23-3403(b)); New Jersey (Rev. Stat. Title 19, ch. 5, § 4); Oregon (Or. Rev. Stat., § 248-075(1)); South Carolina (Code of Laws of S. Carolina, § 7-9-90); South Dakota (S.D. Cod. Laws, § 12-5-16); Vermont (Vt. Stat. Anno., § 17-730); Wyoming (Wy. Stat., § 22-4-110).

state-mandated composition results in badly skewed representation and is directly contrary to the decision and directive of the highest party authority, the existence of a state statute forbidding the party from making its state committee more representative is a gross intrusion on the First Amendment rights of the party and its members and cannot be dismissed as "de minimis" or "historically justified."

CONCLUSION

This case is no mere academic exercise in First Amendment doctrines. The Washington State Democratic Committee governs the Party between conventions. To provide expanded and more equal representation of party members, the 1976 State Democratic Convention added legislative district representatives to the committee. As construed and upheld by the Washington State Supreme Court, RCW 29.42.020 totally bars the party from implementing the convention's mandate.

No justification for RCW 29.42.020 has been offered that could not be met by a less restrictive means. The Washington Supreme Court, however, upheld RCW 29.42.020 on the grounds that its effect on First Amendment rights are so minimal as to require *no* inquiry into state interests or less restrictive means. This holding is clearly contrary to established decisions of this Court and presents a substantial federal question. Probable jurisdiction should be noted and the decision of the Washington Supreme Court summarily reversed.

Respectfully submitted:

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